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In the Supreme Court of the United States

OCTOBER TERM, 1983

FIREFIGHTERS LOCAL UNION NO. 1784, PETITIONER

v.

CARL W. STOTTS, ET AL.

MEMPHIS FIRE DEPARTMENT, ET AL., PETITIONERS

v.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

CHARLES JUSTIN COOPER
Deputy Assistant Attorney General

CARTER G. PHILLIPS
Assistant to the Solicitor General

BRIAN K. LANDSBERG
DENNIS J. DIMSEY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

This brief will address the following question:

Whether the district court exceeded its authority by prohibiting the City of Memphis from laying off and demoting personnel in its fire department on the basis of accumulated seniority in order to maintain the percentage of minority employees in the department who had been hired and promoted pursuant to a consent decree entered into as a settlement of suits charging discrimination in the department's hiring and promotion practices.

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INTEREST OF THE UNITED STATES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.*, prohibits, *inter alia*, racial discrimination in employment. The Attorney General is responsible for the enforcement of Title VII in cases such as this one where the employer is a government, governmental agency, or political subdivision. 42 U.S.C. 2000e-5 (f) (1). This Court's resolution of the issue presented in this case, *viz.*, the propriety of a preliminary injunction requiring that layoffs and demotions of city employees be made not on the basis of a bona fide seniority system,

but rather pursuant to a modified seniority system designed to assure that recently hired and promoted minority employees retain their positions, will have a substantial effect on the Attorney General's enforcement responsibilities under Title VII.

STATEMENT

1. In February 1977, Carl Stotts, a black Captain in the Memphis Fire Department, filed suit in the United States District Court for the Western District of Tennessee against the City of Memphis, the City's Director of Personnel, the Memphis Fire Department, and the Department's Director of Fire Services. The complaint, styled as a class action, alleged that the defendants had engaged in racially discriminatory hiring and promotion practices, in violation of Title VII of the 1964 Civil Rights Act and 42 U.S.C. 1981 and 1983 (Pet. App. A4).[1]

In June 1979, Fred Jones, a black Private in the Fire Department, filed an individual action in the same district court under Title VII and 42 U.S.C. 1983 against the same defendants. Jones alleged in his complaint that he had been denied a promotion to the rank of Fire Inspector because of his race. In September 1979, the district court ordered the cases consolidated (Pet. App. A5).[2]

Subsequently, in April 1980, all of the parties to the consolidated cases agreed to a settlement, which was approved by the district court. In the decree, the City did not admit to having violated any laws; nevertheless it committed itself to a long-term goal of increasing minority representation in each job classification in the De-

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 82-206.

[2] Neither of the complaints raised any issue with respect to layoffs or demotions within the Department.

partment to levels approximating the level of minority representation in the local labor force.[3]

The decree also established a 50% interim hiring goal and 20% interim promotion goal for qualified minorities.[4] Except for a general commitment by the City not to discriminate on the basis of race "with respect to compensation, terms and conditions or privileges of employment" (*id.* at A62), the decree was silent as to the manner in which any layoffs or demotions in the Department were to be conducted.

2. On May 4, 1981, the City announced that for the first time in its history projected budget deficits required personnel reductions in all major departments. The reductions were to be made on the basis of city-wide seniority (Pet. App. A8). Although the City had no formal

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[3] The City had committed itself to the same long-term goal in a consent decree entered into with the United States in 1974 in litigation involving allegations of employment discrimination in violation of Title VII in various city agencies, including the Memphis Fire Department. The City did not admit any misconduct in that decree, but did acknowledge that its employment practices gave rise to an inference of race and sex discrimination (Pet. App. A3).

According to the evidence presented at the preliminary injunction hearing held in 1980, 56% of the persons newly hired by the Department since the entry of the 1974 consent decree have been black (46% including rehires), and 16-17% of the promotions in the Department since that time have gone to blacks (J.A. 48, 57). In 1974, blacks constituted about 32% of the labor force in Shelby County, Tennessee, and approximately 3-4% of the Fire Department (J.A. 47). By 1980, blacks constituted approximately 35% of the labor force in Shelby County (Pet. App. A22 & n.14), and about 10% of the employees in the Fire Department (*id.* at A9 n.5).

[4] The decree provided that "[g]oals established herein are to be interpreted as objectives which require reasonable, good faith efforts on the part of the City, and not as rigid quotas" (Pet. App. A64). It explained further that "[n]othing in this * * * Decree should be construed in such a way to require the promotion of the unqualified or the promotion of the less-qualified over the more qualified as determined by standards shown to be valid and non-discriminatory * * *" (*id.* at A65).

collective bargaining agreements with any of the unions representing its employees, the City had entered into "memoranda of understanding" with the unions, including the petitioner union in this case (J.A. 116-119). These memoranda provided generally for terms and conditions of employment with the City; the memorandum covering the Fire Department provided that "[i]n the event it becomes necessary to reduce the Fire Division, seniority * * * shall govern layoffs and recalls" (J.A. 119). The last-hired, first-fired policy adopted by the City for conducting its proposed layoffs was chosen because of the memoranda of understanding (*id.* at 49).

On the day the layoff program was announced, the district court granted respondents' application for a temporary restraining order prohibiting the City from laying off or demoting[5] any minority employee in the Fire Department (J.A. 23). Petitioner Firefighters Local Union No. 1784 was then permitted to intervene with the consent of the parties (Pet. App. A8).

On May 8, 1981, the court held a hearing on respondents' motion for a preliminary injunction. In order to stay within its budget, the Fire Department proposed to eliminate approximately 55 positions in which there were current employees (J.A. 51). It estimated that the layoff process would result in a reduction in the percentage of black employees in the Fire Department from approximately 11% to 10% (J.A. 54).

Of the 55 positions to be eliminated, most were in the firefighting bureau in the Department (J.A. 52-53, 73, 96-97). The City anticipated that the temporary demotions would result in the percentage of black Lieutenants in the Department being reduced from 12.1% to 6.3%,[6]

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[5] Under the layoff program, Fire Department employees in ranks above Private who were scheduled to be laid off were afforded the option, if they were qualified to do so, of accepting a demotion, thereby "bumping" a junior employee in the lower rank (J.A. 38-39, 64-65).

[6] Before the scheduled demotions, 29 of the Department's 240 Lieutenants were black; after the demotions, 14 of 224 Lieutenants would have been black (Pet. App. A75; J.A. 21).

and that of black drivers from 4.8% to 4.2%[7] (J.A. 96-97; Pet. App. A11 n.5). In the fire fighting bureau, an additional 16 or 17 Private positions were to be eliminated, but the record does not reflect the race of the persons occupying those positions (J.A. 67).

The City estimated that, as a result of layoffs, 52 persons in the Fire Department would be furloughed, of whom 32 (or 61.4%) would be white and 20 (or 38.6%) black (J.A. 65-72). The Mayor of the City testified that he anticipated that attrition would result in restoring demoted or furloughed employees to their former positions within six months to two years (J.A. 39).

3. On May 18, 1981, the district court entered an order granting a preliminary injunction against the City's proposed layoffs (Pet. App. A77-A79). The court found that the 1974 and 1980 consent decrees did not address layoffs or demotions, and that memoranda of understanding between the City and the petitioner union specified that layoffs in the Fire Department were to be made on the basis of city-wide seniority (*id.* at A77-A78).[8] The court further found that the City's layoff plan was not adopted with the purpose or intent to discriminate on the basis of race, but that the effect of these layoffs and reductions in rank is "discriminatory" (*id.* at A78).[9] Based on this finding, the court concluded that the layoff program "is not a bona fide seniority system" (*ibid.*).

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[7] Before the demotions, 15 of the Department's 311 Drivers were black; after the demotions, 13 of 299 Drivers would have been black (Pet. App. A75; J.A. 21, 96-97). Although 8 black Drivers were to be demoted to Private, 6 black Lieutenants were to be demoted to Driver (J.A. 96). Thus the number of black Drivers would have been reduced by only two as a result of the planned demotions.

[8] The court characterized the legal effect of the memoranda under Tennessee law as "uncertain" (Pet. App. A78).

[9] The district court made no findings concerning the statistical impact of the City's layoff program upon minorities either in the Department generally or at any of the various ranks in the Department.

The district court ordered "the defendants not [to] apply the seniority policy proposed insofar as it will decrease the percentage of black lieutenants, drivers, inspectors and privates that are presently employed in the Memphis Fire Department" (*ibid.*). The court later expanded its injunction to include the positions of Fire Alarm Operator I, Fire Prevention Supervisor and Clerk Typist (*id.* at A12).

4. The court of appeals affirmed (Pet. App. A1-A51). The court of appeals agreed with the district court that the City's layoff plan would have a disproportionate adverse effect upon minorities in the Department (*id.* at A8). In light of the district court's unchallenged finding that the City's layoff policy was not adopted with a racially discriminatory purpose, however, the court of appeals set aside the lower court's ruling that the layoff program was not a bona fide seniority system (*id.* at A11 n.6, A41).[10]

The court defined the principal issue on appeal as "whether the district court erred in modifying the 1980 Decree to prevent minority employment from being affected disproportionately by unanticipated layoffs" (*id.* at A12). In deciding that issue the court of appeals first considered whether the 1980 Decree itself was reasonable. It found that the temporary hiring and promotion goals were reasonable and did not unduly abridge the interests of incumbent employees, and therefore were constitutional. Furthermore, the majority held that the district court had conducted an adequate hearing before approving the consent decree (Pet. App. A14-A23).

The court next considered whether modification of the consent decree was proper under general contract principles. Under this theory the court held that the modification was permissible because the "City contracted" to provide "a substantial increase in the number of minorities

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[10] The court found it unnecessary to resolve the question whether the memorandum of understanding between the City and the Union was enforceable under Tennessee law (Pet. App. A33 n.20).

in supervisory positions" (Pet. App. A32) and the layoffs would be a breach of the contract. The district court's modification of the decree merely relieved the City of the full burden that compliance with its contract would have caused (*id.* at A34).

Alternatively, the court of appeals held that the district court could modify the decree to adapt to an unforeseeable change in circumstances. The court upheld the district court's general findings that the City's economic crisis was unanticipated and that the layoffs would undo much of the effect of the affirmative relief in the 1980 decree (Pet. App. A57).

Finally, the court considered the effect of seniority rights on the authority of the district court to protect minorities from layoffs. The court held that a consent decree remedying violations of federal law can modify collective bargaining agreements, including their seniority provisions (Pet. App. A38-A45).

Judge Martin concurred in part and dissented in part (Pet. App. A46-A51). He agreed generally with the majority that the district court did not abuse its discretion in granting a preliminary injunction; however, he disagreed with virtually every specific holding of the majority. He disagreed that the consent decree read as a contract could be construed to require modification of the City's seniority system (*id.* at A46); he rejected the holding that the district court had authority to abrogate the union's contractual and statutory rights (*id.* at A48); and he dissented from the majority's approval of the underlying consent decree and rejection of the union's alternative proposals on the ground that those issues were not properly before the court (*id.* at A49-A50). Finally, he dissented from the "sua sponte conclusion [of the majority] that the decree is 'constitutional.'" (*id.* at A50).[11]

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[11] According to respondents' suggestion of mootness and petitioners' joint response thereto, all of the firefighters who were laid

SUMMARY OF ARGUMENT

1. This Court has repeatedly held that in exercising the equitable authority granted in Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.*, courts are limited by the general policies and overall objectives of the Act. See, *e.g.*, *Ford Motor Co.* v. *EEOC*, No. 81-300 (June 28, 1982), slip op. 7-8. One policy of "overriding importance" in labor law generally (*Humphrey* v. *Moore*, 375 U.S. 335, 346 (1946)), and of special significance under Title VII, is the preservation of seniority systems and the protection of the rights they

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off or demoted have now been restored to their former positions. The reinstatement of the employees, however, does not appear to moot the case.

A case is moot if (1) it can be said with assurance that there is no reasonable expectation that the enjoined conduct will recur and (2) interim events have completely and irrevocably eradicated the effects of the injunction. *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979). Neither condition appears to be satisfied here. The City asserts in its response to the suggestion of mootness (Jt. Opp. to Suggestion of Mootness 5) that it "cannot provide assurances that further layoffs for fiscal reasons will not be necessitated during the effective period of the consent decree in this matter." Unlike *Boston Firefighters Union* v. *Boston Chapter*, NAACP, No. 82-185 (May 16, 1983), this case does not involve a state statute protecting those who were laid off or demoted from future reductions in force. Thus, it cannot be said with any assurance that the controversy giving rise to this litigation will not recur. Nor can it be said that the reinstatements have completely eradicated the effects of the layoffs and demotions. According to petitioners, those laid off lost pay and seniority, and, in some instances, the opportunity to take promotional exams (Jt. Opp. to Suggestion of Mootness 5-6 and n.1).

In these circumstances, respondents do not appear to have satisfied their "heavy" burden (*United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632-633 (1953)) of showing that "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969). Rather, the controversy in this case still appears to be "definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 240-241 (1937).

confer. *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977); 42 U.S.C. 2000e-2(h).

Congress demonstrated particular concern in 1964 that the proposed Title VII might impair the legitimate interests of incumbent employees (see, *e.g.*, 110 Cong. Rec. 486-489 (1964) (remarks of Sen. Hill), and accordingly conferred immunity under Section 703(h) of Title VII to bona fide seniority systems. Consistent with this congressional intent, this Court has generally resisted efforts by litigants to modify seniority systems. See, *e.g.*, *Teamsters* v. *United States*, 431 U.S. 324 (1977); *American Tobacco Co.* v. *Patterson*, 456 U.S. 63 (1982). The only exception to this rule is the use of constructive seniority as a proper remedy for identifiable victims of discrimination, because it equitably places them in their rightful slot within the seniority system and does so without in any way modifying that system. See *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976). This exception is justified because of Congress's overriding desire to "make whole" *individual* victims of discrimination. See *Connecticut* v. *Teal*, 457 U.S. 440 (1982).

But this case involves both a bona fide seniority system and claims solely by individuals who have never shown that they were actual victims of discrimination. This Court had virtually the same situation before it in *Teamsters* v. *United States*, 431 U.S. 324 (1977), and held in a slightly different context that no modification of the employer's seniority system was justified.

The district court's order amounts to nothing more than a retroactive effort to confer constructive seniority rights identical to those denied the employees in *Teamsters* who could not show that they were victims entitled to be slotted into the seniority system. Time has passed and the financial condition of the employer has worsened. But the minorities involved are still non-victims of discrimination who can receive relief only at the expense of "bumping" incumbent white employees. See *Patterson* v.

American Tobacco Co., 535 F.2d 257 (4th Cir. 1976). Moreover, in order to grant this relief, the district court must substantially modify the seniority system as it applies to layoffs and demotions and thereby undermine the City's legitimate purpose in adopting the system negotiated with the union representing its employees. Accordingly, the reasoning and holding of *Teamsters* directly control this case and forbid the modification of the decree at issue here.

2. The district court's order, requiring non-victim minorities who are discharged or demoted because of seniority to be retained, is contrary to the last sentence of Section 706(g), 42 U.S.C. 2000e-5(g), which precludes a district court from ordering reinstatement or promotion if the reason for an employee's release or demotion is something other than race or sex, etc. The last sentence in Section 706(g), which reflects the statutory intent to "make whole" actual victims of racial discrimination, permits employers to make employment decisions on any basis other than race and thus immunizes the decision of the City of Memphis to lay off minority employees who are not victims of discrimination and who have less seniority than other employees.

3. By concluding that Title VII permitted the race conscious order at issue, the courts below have unnecessarily created a difficult constitutional issue under the equal protection component of the Due Process Clause of the Fifth Amendment, regarding the scope of Congress's power under Section 5 of the Fourteenth Amendment to authorize courts to provide for race conscious remedies. Accordingly, the Court should vacate the order as inconsistent with Title VII in order to avoid the constitutional issue that otherwise would exist. See *United States* v. *Security Industrial Bank*, No. 81-184 (Nov. 30, 1982); *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979).

ARGUMENT

THE DISTRICT COURT'S ORDER EXCEEDED ITS REMEDIAL AUTHORITY UNDER SECTION 706(g) OF TITLE VII

The opinion of the court of appeals touches on a variety of issues relating generally to affirmative action, consent decrees and collective bargaining agreements, but the court's analysis never reaches the real issue in this case, viz., whether a district court can modify a consent decree, which was designed solely to remedy hiring and promotion discrimination, in order to grant minority individuals, who have made no showing that they were victims of discrimination, rights that are superior to the seniority rights of white employees. Thus, regardless of the validity of the original decree and the relationship in general between consent decrees and collective bargaining agreements—the issues that preoccupied the court of appeals—this Court's decisions make clear that a court cannot, consistent with Title VII of the Civil Rights Act of 1964, in effect abrogate a seniority system on behalf of non-victims in order to protect them from layoffs or demotions that otherwise would occur on the basis of the last-hired, first-fired rule.[12]

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[12] A threshold question is whether this case is controlled by Title VII principles. The complaint filed by the United States in 1974 was predicated solely on Title VII, but the complaints of the respondents alleged, in addition to a Title VII violation, that the employment practices of the Fire Department violated 42 U.S.C. 1981 and 1983 (J.A. 8, 15). The consent agreement, itself, is plainly limited to Title VII; the City expressly denied any violations of law, but entered into the agreement "to insure that any disadvantage to minorities that may have *resulted* from past hiring and promotional practices be remedied" (Pet. App. A59-A60; emphasis supplied). This settlement thus is plainly limited to respondents' Title VII claim that the City's employment practices have a discriminatory effect. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). The City did not concede that it engaged in any purposeful discrimination, nor has any court made such a finding, which would be required for this case to be controlled by principles other than Title VII's. See *Washington* v. *Davis*, 426 U.S. 229 (1976); *General*

Although this case was settled, it is clear that for present purposes the remedial authority of the district court under 42 U.S.C. 2000e-5(g) is the same as if the case had gone to a final, litigated judgment.[13] Once it is adjudged that an employer has engaged in an unlawful employment practice within the meaning of Title VII, a district court is invested with authority to enjoin the employer from engaging in that practice in the future, and also is empowered to "order such affirmative action as

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Building Contractors Association v. *Pennsylvania*, No. 81-280 (June 29, 1982). Accordingly, the propriety of the district court's remedial order must be measured by Title VII standards.

[13] The opinion of the court of appeals basically ignores Title VII and focuses exclusively on the authority of a district court to implement a consent decree in light of the parties' intent and to adapt the decree to changed circumstances. The effect of the court's reasoning, however, is to grant the district court greater remedial authority in a Title VII case concluded by consent decree than the court would have if the case had been litigated to final judgment and a remedial order entered. Obviously, such a result would seriously deter employers from entering into consent agreements under Title VII. This would be in direct contravention of Congress's expressed preference for voluntary settlement of employment discrimination suits. See *W. R. Grace & Co.* v. *Local 759*, No. 81-1314 (May 31, 1983), slip op. 13; *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 368 (1977); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Moreover, a "District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce." *System Federation* v. *Wright*, 364 U.S. 642, 651 (1961).

Nor can the expansive relief ordered in this case be justified on the theory that respondents relied on the consent decree to assure their employment, "hav[ing] foregone their right to litigate the City's past employment practices and possibly obtain greater relief" (Pet. App. A37). Respondents already had been granted substantial affirmative relief in the form of hiring goals that were more than satisfied by the City. Since respondents were not themselves victims of any discrimination, the district court could not have granted them any constructive seniority. *Teamsters* v. *United States*, *supra*. Accordingly, respondents could hardly have obtained any greater affirmative relief after trial than they received under the settlement.

may be appropriate, which may include * * * reinstatement, or hiring of employees, * * * or any other equitable relief as the court deems appropriate." 42 U.S.C. 2000e-5(g). Although the grant of equitable authority on its face is broad, it is necessarily constrained by the policies of the Act, as reflected in its substantive provisions. Compare *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99, 108 (1970). See also *Ford Motor Co.* v. *EEOC*, No. 81-300 (June 28, 1982), slip op. 8; *Teamsters* v. *United States*, 431 U.S. 324, 364 (1977); *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 405 (1970).

A. The Order Of The District Court Disregards The Important Statutory Policy Embodied In Section 703(h), 42 U.S.C. 2000e-2(h), To Protect Seniority Systems, Ignores The Legitimate Interests Of Incumbent Employees In Those Systems And Grants Unwarranted Protection To Non-Victims Of Discrimination

What the court of appeals' discussion of the consent decrees and collective bargaining agreements completely ignores is that seniority is not just another term in a collective bargaining agreement. There is a special statutory importance attached to seniority systems and the rights those systems allocate to employees that bears significantly on the propriety of a district court's exercise of equitable authority. See *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 75-76 (1982); *California Brewers Association* v. *Bryant*, 444 U.S. 598, 606-607 (1980); *Humphrey* v. *Moore*, 375 U.S. 335, 346 (1964). This Court has pointed out that "seniority systems are afforded special treatment under Title VII itself." *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 81 (1977). Section 703(h), 42 U.S.C. 2000e-2(h), by its terms, immunizes all bona fide seniority systems from challenge under Title VII, even systems, such as the one in this case, that have a disproportionate adverse impact on minorities (*Teamsters* v. *United States*, *supra*), or op-

erate to perpetuate past employment discrimination (*United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977)).[14]

Members of Congress in 1964 were very concerned about the possible effect the proposed Title VII might have on the seniority rights of employees. See H.R. Rep. No. 914, 88th Cong., 1st Sess. 71-72 (1963); 110 Cong. Rec. 486-487 (1964) (remarks of Sen. Hill). Accordingly, Senator Clark, one of the the floor managers of the bill, submitted a Justice Department memorandum stating that the proposed Title VII would not affect existing seniority rights. 110 Cong. Rec. 7207 (1964); *id.* at 7212-7215; *id.* 7216-7217 (remarks of Sen. Clark).

During the Senate debates, Section 703(h) was included in the substitute bill that eventually was adopted. The provision was adopted to clarify the Act's "present intent and effect" with regard to seniority. 110 Cong. Rec. 12723 (1964) (remarks of Sen. Humphrey); *id.* at 12818-12819 (remarks of Sen. Dirksen).[15] Congress thus intended generally to accord special status to seniority systems and the stability that they provide to labor relations and specifically expressed concern that Title VII not operate to modify the last-hired, first-fired principle that lies at the heart of most seniority systems. Accordingly, Title VII remedies must be designed to preserve the fundamentals of bona fide seniority systems. Compare *American Tobacco Co.* v. *Patterson*, *supra*; *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 559 (1977); *Teamsters* v. *United States*, *supra*; *California*

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[14] Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h), provides, in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority * * * system * * * provided that such differences are not the result of an intention to discriminate because of race * * *.

[15] Congress made no change in Section 703(h) when it revised Title VII in 1972. See *Teamsters* v. *United States*, *supra*, 431 U.S. at 354 n.39.

Brewers Association v. *Bryant*, 444 U.S. 598 (1980), with *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976).

Under this Court's decisions, the only accommodation that a bona fide seniority system must make under Title VII is to allow actual victims of discrimination to be slotted into their rightful place in the system. See, *e.g.*, *Franks* v. *Bowman Transportation Co.*, *supra*. *Franks* involved a discrimination claim by a class of black non-employee applicants who had unsuccessfully sought employment as over-the-road truck drivers. The district court found that the employer had engaged in a pattern of racial discrimination in hiring, transfer and discharge of employees. The district court ordered the employer to give priority consideration to class members for over-the road jobs, but declined to award back pay or constructive seniority retroactive to the date of the individual's application. The court of appeals reversed the district court's ruling on back pay, but affirmed its refusal to award retroactive seniority.

This Court held that for actual victims of unlawful discrimination constructive seniority back to the date of the discriminatory act was an appropriate remedy in order to restore those victims to their "rightful place," that is, restore them "to a position where they would have been were it not for the unlawful discrimination." 424 U.S. at 764, quoting 118 Cong. Rec. 7168 (1972). See also *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975).

The Court's remedial holding granting make-whole relief to individual victims reflects Congress's dominant concern in Title VII for protecting the individual. Unlawful employment practices are defined by an employer's decision to hire or fire "any individual, or otherwise to discriminate against any individual * * * [or to] deprive or tend to deprive any individual of employment opportunities" because of the individual's race, etc. 42 U.S.C. 2000e-2(a). "The principal focus of the statute is the protection of the individual employee * * *. Indeed, the

entire statute and its legislative history are replete with references to protection for the individual employee * * *." *Connecticut* v. *Teal*, 457 U.S. 440, 453-454 (1982); see also *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 709 (1978); *Arizona Governing Committee* v. *Norris*, No. 82-52 (July 6, 1983), slip op. 9; pages 17-21, 26-29, *infra*.

Thus, where the dominant concern of Congress—making individual victims whole—has competed with Congress's concomitant intention to protect seniority systems and the rights they accord to incumbent employees, this Court has very carefully accommodated both interests. Significantly, the constructive seniority rights awarded in *Franks* were not judicially invented rights, but only the rights defined by the existing seniority system itself, once the "rightful place" in that system of each identifiable victim of discrimination was determined. The seniority right of incumbent employees would also continue to be defined by that system, even though the "rightful place" in that system of some incumbents would be adjusted to accommodate the rights of individuals who would have been senior to them but for the employer's unlawful discriminatory acts. See 424 U.S. at 774-779. Thus, the relief prescribed in *Franks* fundamentally preserves rather than abrogates rights under bona fide seniority systems, while extending those rights to identifiable victims of discrimination in order to make them whole.

The basic statutory preservation of bona fide seniority systems was reasserted by the Court the next year in *Teamsters* v. *United States*, 431 U.S. 324 (1977). In *Teamsters*, the defendant trucking company was found to have engaged in an unlawful pattern or practice of confining blacks and Hispanics to lower paying, less desirable jobs, and excluding them from positions as over-the-road ("OTR") truck drivers. The seniority system in the employer's collective-bargaining agreement provided that an incumbent employee who transferred to an OTR position was required to forfeit the competitive seniority he had accumulated in his previous position (company sen-

iority) and to start at the bottom of the OTR driver's seniority list.

After affirming the district court's finding of liability under Title VII, the court of appeals held that all black and Hispanic incumbent employees—including those who had never applied for OTR positions—were entitled to bid for future OTR jobs on the basis of their accumulated company seniority. The appeals court further held that each class member filling such a job was entitled to an award of retroactive seniority on the OTR driver's seniority list dating back to the class member's "qualification date"—the date when (1) an OTR driver position was vacant and (2) the class member met or could have met the job's qualifications.

This Court first reversed the holding that the defendant's seniority system was itself subject to attack as perpetuating the past effects of discrimination. Although the system appeared to violate the rationale in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), the Court held that Congress did not "outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees * * *." 431 U.S. at 352-353.

The Court then considered what remedy was appropriate for the other discriminatory employment practices that had been proved. This Court rejected the defendant's argument that only individuals who had actually applied for OTR positions could obtain relief under Section 706(g). Instead, the Court held that relief in the form of constructive seniority was available to those who could satisfy the burden of proving that they were deterred from applying for that position because of the employer's discriminatory practices and that they were qualified for the job. 431 U.S. at 372. This latter class of plaintiffs, like those who were actually precluded from obtaining the OTR jobs, could show when they presumably would have been employed, but for the discrimination, and thus relief to them would not require modification of the seniority system itself, but merely "rightful place" fitting of individuals into that system. 431 U.S. at 358.

As for those who could not make such a showing, the necessary result is that they were not entitled to any relief in the form of constructive seniority.

Teamsters establishes that Title VII remedies must preserve the seniority rights protected in Section 703(h). Preservation of those rights serves two important concerns: protecting the stability of labor relations by maintaining the seniority system and being fair to innocent incumbent employees.[16] With regard to the latter concern, this Court recently emphasized that, in crafting equitable relief under Title VII, courts must consider the legitimate interests of "innocent third parties." *Ford Motor Co.* v. *EEOC*, *supra*, slip op. 20. See also *Arizona Governing Committee* v. *Norris*, *supra*, slip op. 5 (O'Connor, J., concurring). Indeed, even in a case (unlike this one) in which specified victims of unlawful employment discrimination have been identified, a court, in determining their rightful place, is "faced with the delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing." *Teamsters* v. *United States*, *supra*, 431 U.S. at 372.[17]

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[16] Lower courts have uniformly held that the relief for actual discriminatees does not extend to bumping employees previously occupying jobs; victims must wait for vacancies to occur. See, *e.g.*, *Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 267 (4th Cir. 1976); *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980, 988 (5th Cir. 1969). See also *Airline Stewards & Stewardesses Association* v. *American Airlines*, 573 F.2d 960, 964 (7th Cir.), cert. denied, 439 U.S. 876 (1978). This understanding of the limits of Section 706(g) with regard to actual victims may well have been ratified by Congress in 1972, since it was aware of the *United Papermakers* decision and nothing indicates that the amendment to Section 706(g) was an attempt to alter that interpretation. See Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972*, at 1844 (Comm. Print 1972) (hereinafter cited as *1972 Legislative History*).

[17] The court of appeals incorrectly relied upon the Seventh Circuit's decision in *Airline Stewards and Stewardesses Association* v. *American Airlines*, *supra*, as showing how consent decrees can

In *Ford Motor Co.* v. *EEOC*, *supra*, this Court relied upon both the basic congressional intent to protect seniority and the importance of fairness to incumbent employees in deciding that an employer charged with hiring discrimination under Title VII can toll the continuing accrual of back pay liability under Section 706(g) by unconditionally offering the claimant the job allegedly denied him for impermissible reasons. The Court expressly rejected the argument that the employer must also offer seniority retroactive to the date of the alleged discrimination, for such a rule would "encourage[] job offers that compel *innocent workers* to sacrifice their seniority to a person who has only claimed, but not yet proven, unlawful discrimination." Slip op. 21 (emphasis added). Foreseeing the possibility that layoffs could occur before the reinstated (or newly hired) claimant's Title VII suit was decided, the court reasoned that (*ibid.*)

> an employer may have to furlough an innocent worker indefinitely while retaining a claimant who was given retroactive seniority. If the claimant

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modify collective bargaining agreements in order to further the statutory policy favoring settlements of Title VII cases. The *Stewardesses* case, correctly understood, is contrary to the decision below and illustrates how the relevant interests should be accommodated under Title VII. In *Stewardesses*, it was undisputed that each member of the plaintiff class had been a victim of the defendant's employment discrimination, but there was a dispute as to whether each member had preserved her right to sue. The defendant settled the case, and the intervening union sought to challenge the settlement.

In upholding the settlement, the court of appeals noted that each member of the class was a victim and that, although they all would receive seniority dating to the time of their wrongful discharge, they would not be hired unless there were an opening and they would not be permitted to bump incumbent employees from a particular base, even though their constructive seniority might otherwise have entitled them to do so. This is precisely the type of careful accommodating of the rights of actual victims of discrimination and innocent incumbent employees that this Court's decisions require, and stands in stark contrast to the decision below which forced incumbent employees to be laid off so that non-victim minorities could keep their jobs.

> subsequently fails to prove unlawful discrimination, the worker unfairly relegated to the unemployment lines has no redress for the wrong done him. We do not believe that " 'the large objectives' " of Title VII * * * require innocent employees to carry such a heavy burden.

What emerges from this Court's decisions is the firm rule that a district court in a Title VII case may not modify a bona fide seniority system; it can only slot individuals into their rightful place within that system. Individuals, such as those involved in this case, who are only beneficiaries of affirmative action and not victims of employment discrimination entitled to rightful place relief, have no basis for claiming any seniority in addition to what they have actually accrued on the job. Thus, when the initial hiring order was issued in 1974 and again in 1980, the district court would have been wholly without authority to slot new applicants in place of incumbents (see note 16, *supra*) or to award non-victims of discrimination constructive seniority when hired. The district court's order insulating a certain percentage of minority employees from dismissal under the race neutral seniority system adopted by the City was, however, tantamount to an award of constructive seniority that placed its beneficiaries in a position superior to that of incumbent non-minority employees.[18] Since the order concededly

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[18] It is of no significance that the award of constructive seniority here was only for the limited purpose of determining who would be laid off or demoted. Under the City's bona fide seniority system, that important question was to be determined on the basis of seniority.

Nor can the order be justified by the hyperbole of the courts below that the proposed layoffs would undo all the good that the previous orders had accomplished. First, the percentage of minorities in the Fire Department is still significantly greater than it was when this litigation began and thus the post-layoff Department is significantly improved in racial balance over the prelitigation situation. Second, although layoffs are always traumatic to the individual, they do not normally last forever. The laid off minority employees are at the top of the list to be rehired or promoted and,

embraced persons who were not victims of the defendants' unlawful employment discrimination, the district court's award of retroactive seniority was indistinguishable—save in its timing—from the award condemned in *Teamsters*.[19]

In the instant case, innocent firefighters were required to sacrifice not only their seniority, but also their jobs, to persons who have never claimed to be victims of unlawful discrimination. As a result of the district court's decree, white firefighters with more years of service than black employees were furloughed or demoted, thus creating a new class of victims, who were innocent of any wrongdoing, but were deprived of their rights under a valid

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without the district court's modification, when the financial crisis of the City is over, if it is not already, and fire personnel are hired or repromoted, minorities will continue back on the track set by the 1980 order. The effect of the layoff is delay in achieving the order's goal of a rough racial balance in employment at all levels, but delay is inherent in that process, given the legitimate interests of incumbents, and does not justify extraordinary relief.

[19] Nor is a contrary result justified by the court of appeals' assertion that allowing layoffs would undermine the purpose of the 1980 decree (Pet. App. A37). There has been no new violation of the Act that would require a modification of the decree and accordingly the issue is simply whether the district court could have modified the seniority system when it initially entered its order in 1980. If the City of Memphis had been faced with this budgetary crisis in 1980 when the original affirmative action order was imposed, no one would have suggested that the remedial order was undermined by the temporary failure of the City to integrate its work force. Certainly, the district court would have lacked authority either to order the City to hire additional employees or to require the City to bump incumbent white employees to make room for minority hires. See cases cited note 16, *supra*. The order in this case does no more than retroactively accomplish what the court could not have done directly in 1980 if the economic problems had existed then; it requires the City essentially to bump incumbent whites. This result is directly contrary to this Court's admonition that equity under Title VII should not permit "'different results for breaches of duty in situations that cannot be differentiated in policy.'" *Ford Motor Co.* v. *EEOC*, *supra*, slip op. 8 (citation omitted).

seniority system.[20] This was not a permissible exercise of remedial authority under Title VII. That remedial authority is limited to the effectuation of the policies of the Act; one of the Act's firmly established policies is the preservation of bona fide seniority systems. No court has found any discriminatory purpose underlying the seniority system in this case[21] and accordingly the district court

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[20] The court of appeals reasoned (Pet. App. A32) that modification of the consent decree could be justified as an interpretation of the consent decree as a contractual obligation. Aside from the obvious point that the parties made no provision for layoffs and thus the decree cannot fairly be construed to require modification of the layoff process (Pet. App. A46; Martin, J., dissenting), it is clear that the City could not unilaterally contract away the incumbent employees' seniority rights that are in fact protected by Title VII. See *W.R. Grace & Co.* v. *Local 759*, No. 81-1314 (May 31, 1983), slip op. 14.

Nor could such an agreement be approved under *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979). Unlike the private voluntary craft training program in that case, the court's layoff order led directly to the discharge of senior white employees, solely in order to maintain existing racial percentages. Even in interpreting Title VII's prohibitions in a context not involving state action, *Weber* disapproved actions which "unnecessarily trammel the interests of the white employees." 443 U.S. at 208. In contrast to this case, two of the critical facts leading to the conclusion that the training program in *Weber* did not violate Title VII were that the program did not require the discharge of white workers and their replacement with new black hires and was not intended to maintain racial balance. What is more important, the defendant in this case is a municipality and its conduct constitutes state action. Accordingly, the court of appeals' "contract" theory also implicates a serious equal protection issue, which that court completely ignored. Since the City plainly did not enter into a contract modifying seniority rights on the basis of race, however, there is no need for the Court to consider the constitutional implications of such a contract.

[21] The court of appeals at one point seems to indicate that the City selected job classifications for layoff "where minorities had recently made the most gains under the affirmative action provisions" (Pet. App. A37). No similar finding was made by the district court, and the Mayor of the City testified that jobs in the Fire Department were chosen because a study revealed that the

was without authority to reconstruct it.[22]

B. The Limitation On The Court's Remedial Authority Contained In The Last Sentence Of Section 706(g) Confirms That Congress Did Not Intend To Grant Constructive Seniority In The Circumstances Of This Case

Our argument that the policies of Title VII make plain that bona fide seniority systems ought not to be modified to grant non-victim beneficiaries of affirmative action additional protection from layoffs is confirmed by the limitation on the powers of a court of equity in Title VII cases contained in the last sentence of Section 706(g). That sentence reads in pertinent part:

> No order of the court shall require the * * * reinstatement, or promotion of an individual as an employee * * * if such individual * * * was suspended

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City's budget for the Fire Department was substantially higher than the national average and thus cuts could be made there without eliminating necessary services (J.A. 36-37).

Obviously, if the City had selectively chosen layoffs on the basis of which jobs were filled by more blacks, this would be an independent basis for challenging the City's action, but the remedy for such discrimination would not be to require a modification in the City's bona fide seniority system.

[22] The decision of the district court cannot be sustained as a proper exercise of "discretion in protecting the status quo in the Fire Department" (Pet. App. A46) (Martin, J., concurring and dissenting). While it is true that the entry of a preliminary injunction by a district court generally is reviewable on an abuse of discretion standard, "[i]f the [reviewing] court has a view as to the applicable legal principle that is different from that premised by the trial judge, it has a duty to apply the principle which it believes proper and sound." *Delaware & H. Ry.* v. *United Transportation Union*, 450 F.2d 603, 620 (D.C. Cir.) (Leventhal, J.), cert. denied, 403 U.S. 911 (1971). See also *Withrow* v. *Larkin*, 421 U.S. 35, 55 (1975). The preservation of the status quo cannot be justified at the expense of wrongfully depriving the enjoined party and third parties of substantial rights. 450 F.2d at 621; *O'Connor* v. *Board of Education*, 645 F.2d 578, 582-583 (7th Cir.), cert. denied, 454 U.S. 1084 (1981); *Punnett* v. *Carter*, 621 F.2d 578, 587 (3d Cir. 1980).

> or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin * * *.

Section 706(g) by its terms thus precludes the kind of individual redress granted to these minority employees who have suffered no discrimination.[23]

This conclusion is also required by the remedial purposes of Title VII embodied in Section 706(g). As this Court has recognized, "[t]he scope of a district court's remedial powers under Title VII is determined by the purposes of the Act." *Teamsters* v. *United States*, *supra*, 431 U.S. at 364. The central remedial purposes of Title VII are, as this Court has often observed, "to end discrimination * * * [and] to compensate the victims for their injuries." *Ford Motor Co.* v. *EEOC*, *supra*, slip op. 11; see, *e.g.*, *Teamsters* v. *United States*, *supra*, 431 U.S. 364; *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 418. Section 706(g) thus requires a court "to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination in hiring." *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 764 (footnote omitted); accord, *Teamsters* v. *United States*, *supra*, 431 U.S. at 364.

The district court's decree ordered the City to implement layoffs in order to maintain existing levels of black employees. In other words, the decree required the City to lay off employees in accordance with racial quotas, and did so without regard to whether the individuals retained had been the actual victims of the City's employment discrimination. This remedy, which inevitably provides employment preferences to individuals who were not "suspended or discharged" by the employer in violation of Title VII, would thus appear to be the archetypal form

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[23] The Equal Employment Opportunity Commission disagrees with this interpretation of Section 706(g) and believes that its adoption might call into question numerous extant consent decrees and conciliation agreements to which the EEOC is party.

was without authority to reconstruct it.[22]

B. The Limitation On The Court's Remedial Authority Contained In The Last Sentence Of Section 706(g) Confirms That Congress Did Not Intend To Grant Constructive Seniority In The Circumstances Of This Case

Our argument that the policies of Title VII make plain that bona fide seniority systems ought not to be modified to grant non-victim beneficiaries of affirmative action additional protection from layoffs is confirmed by the limitation on the powers of a court of equity in Title VII cases contained in the last sentence of Section 706(g). That sentence reads in pertinent part:

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of relief that Congress determined should not be used to "remedy" such violations of the Act. The statute's language on this point is further supported by its legislative history.[24]

Representative Celler, floor manager of the House bill in 1964 and a principal draftsman of Section 706(g) (see 110 Cong. Rec. 2567 (1964) (remarks of Rep. Celler)), expressly noted that a court order could be entered only on proof "that the particular employer involved had in fact, discriminated against one or more of his employees because of race," emphasizing that "[e]ven then, the court could not order that any preference be given to any particular race * * *, but would be limited to ordering an end to discrimination." *Id.* at 1518. Representative Celler's understanding of Title VII was repeated by other supporters during the House debate.[25]

Supporters of Title VII in the Senate, following the lead of Senator Humphrey, the Democratic floor manager of the bill (110 Cong. Rec. at 5423 (1964)), took a similar view of the remedial authority of the courts under Section 706(g). In an interpretative memorandum often cited by this Court as an "authoritative indicator" of the meaning of Title VII (*e.g.*, *American Tobacco Co.* v. *Patterson*, *supra*, 456 U.S. at 73), Senators Clark and Case, the bipartisan floor "captains" responsible for explaining Title VII, provided a detailed description of the intended

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[24] For a fuller description of the legislative history, see Comment, *Preferential Relief Under Title VII*, 65 Va. L. Rev. 729 (1979). See also Brief Amicus Curiae for the AFL-CIO at pages 18-25 and 1a-8a.

[25] See 110 Cong. Rec. 1540 (Rep. Lindsay); *id.* at 1600 (Rep. Minish). Similarly, an interpretative memorandum prepared by the Republican Members of the House Judiciary Committee defined the scope of permissible judicial remedies under Title VII thusly: "[A] Federal court may enjoin an employer * * * from practicing further discrimination and may order the hiring or reinstatement of an employee * * *. But, [T]itle VII *does not permit the ordering of racial quotas* in businesses or unions * * *." (*Id.* at 6566 (emphasis added)).

meaning of Section 706(g). Noting that "the court could order appropriate affirmative relief," Senators Clark and Case stressed:

> No court order can require * * * reinstatement * * * or payment of back pay for anyone *who was not discriminated against in violation of this title.* This is stated expressly in the last sentence of Section [706(g)] which makes clear what is implicit throughout the whole title; that employers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because of race, color, religion, sex, or national origin. [110 Cong. Rec. at 7214. See *id.* at 6549 (Senator Humphrey).]

Moreover, nothing in the 1964 legislative debates so much as hints at support for the remedy adopted by the district court here. To the contrary, every Representative and every Senator to address the issue decried the use of such remedies. See 110 Cong. Rec. 6549 (remarks of Sen. Humphrey); *id.* at 6563 (remarks of Sen. Kuchel), 7207 (remarks of Sen. Clark).[26]

Congress's dominant concern with granting victim-specific, make-whole relief was not modified when Congress amended Title VII in 1972. The only arguably relevant change of Section 706(g) was the addition of

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[26] To dispel all doubt as to the intended reach of Section 706(g), Senator Humphrey expressly addressed the claims of opponents regarding quota remedies as follows (110 Cong. Rec. 6549): "Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require * * * firing * * * of employees in order to meet a racial 'quota' or to achieve a certain racial balance." See also *id.* at 6563 (remarks of Sen. Kuchel); *id.* at 7207 (remarks of Sen. Clark). Moreover, throughout the Senate debate, the principal Senate sponsors prepared and delivered a daily Bipartisan Civil Rights Newsletter to supporters of the bill. The issue of the Newsletter published two days after the opponents' filibuster had begun, declared: "Under title VII, *not even a court,* much less the Commission, *could order racial quotas* or * * * payment of back pay *for anyone who is not discriminated against in violation of this title.*" *Id.* at 14465 (emphasis added).

language making clear that discriminatees are entitled not only to the specific types of relief expressly mentioned in the section, but also to "any other equitable relief as the court deems appropriate." [27]

That this language was not added to the first sentence of Section 706(g) for the purpose of expanding judicial remedial authority beyond traditional limits is made clear in the Section-by-Section Analysis of the conference bill.[28]

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[27] The language added in 1972 had its origin in an amendment introduced by Senator Dominick, who opposed a provision in the Labor Committee bill to confer "cease and desist" authority on the EEOC; the committee bill proposed to make no change in either Section 703 or Section 706(g). Dominick's filibuster of the committee bill ended with adoption of his amendment, which denied the EEOC independent enforcement authority, but granted it power to institute lawsuits in federal court. The purpose of the language added to the first sentence of Section 706(g) was not explained, or even discussed, by Senator Dominick or anyone else during the debate.

[28] The House of Representatives legislated in 1972 on the understanding that Title VII did not, and as amended would not, authorize judicial impostion of quota remedies. Although it is not at all clear precisely what any individual member of Congress meant when referring to "quotas," either in 1964 or 1972, it seems plain that the definition must encompass the type of strict numerical guarantee against layoffs at issue in this case. Accordingly, there is no occasion to consider here whether these legislative statements would apply to any situation except the classic, fixed numerical quota remedy in the layoff context.

The 1972 amendments began in the House, where Representative Hawkins introduced a bill designed, among other things, to give the EEOC "cease and desist" powers and to transfer the administration of Executive Order No. 11246 from the Labor Department's Office of Federal Contract Compliance (OFCC) to the EEOC. Because the OFCC had imposed quotas in its enforcement of E.O. 11246, many members of Congress feared that the bill would confer on the EEOC authority to order employment quotas.

Before debate commenced, Representative Dent, the bill's floor manager, proposed an amendment that "would forbid the EEOC from imposing any quotas or preferential treatment of any employees in its administration of the Federal contract-compliance program." 1972 *Legislative History*, *supra* note 16, at 190. The amendment did not address the remedial power of courts under Title VII because,

That Analysis explained that "the scope of relief under [Section 706(g)] is intended to make the *victims of unlawful discrimination whole*, * * * [which] requires that *persons aggrieved* by the consequences and effects of the unlawful employment practice *be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.*" (Emphasis added.) 118 Cong. Rec. 7168 (Senate); *id.* at 7565 (House).[29] Compare *Franks* v. *Bowman Transportation Co., supra*, 424 U.S. at 764.

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according to Representative Dent, "[s]uch a prohibition against the imposition of quotas or preferential treatment already applies to actions brought under Title VII." *Ibid.* See also *id.* at 204; *id.* at 208-209 (remarks of Rep. Hawkins). The House ultimately passed a substitute bill that left administration of Executive Order No. 11246 with the OFCC, and the Dent amendment never came to a vote. The House debate reflects, however, broad agreement that Title VII does not and should not permit courts to order "quota" remedies.

It is also noteworthy that the 1972 Congress refused to follow the Senate's proposed amendment to delete the final sentence from Section 706(g). (S. 2515, 92d Cong., 2d Sess. (1972); 1972 *Legislative History, supra* note 16, at 1783). Instead, it ultimately adopted the House bill (H.R. 1746, 92d Cong., 1st Sess. (1972)), which left the 1964 provision largely unchanged, except for the addition of a provision limiting back pay awards. See 1972 *Legislative History* at 331-332. Thus the bill that ultimately emerged from the House-Senate conference and became law contained the original final sentence of Section 706(g). S. Conf. Rep. No. 92-681, 92d Cong., 2d Sess. 5-6, 18-19 (1972); H.R. Conf. Rep. No. 92-899, 92d Cong., 2d Sess. 5-6, 18-19 (1972).

[29] Some courts construing Section 706(g) have mistakenly attached interpretative significance to Senator Ervin's unsuccessful attempt to amend Title VII in 1972. See *United States* v. *Int'l Union of Elevator Constructors*, 538 F.2d 1012, 1019-1020 (3d Cir. 1976). Those amendments, however, did not seek to alter Section 706(g). Indeed, it is clear from the language of the amendments (118 Cong. Rec. 1662, 4917) and from their sponsor's explanations (*id.* at 1663-1664, 4917-4918) that neither amendment was concerned directly with the remedial authority of courts. To the contrary, the amendments would merely have extended to all federal Executive agencies, particularly the Office of Federal Contract Compliance, Section 703(j)'s substantive prohibition against requiring employers to engage in racially preferential hiring in order to rectify racial

Thus, as this Court concluded in *Franks* v. *Bowman Transportation Co., supra*, 424 U.S. at 764 n.21, the "extensive legislative history underlying the 1972 amendments," including addition of the "phrase speaking to 'other equitable relief' in § 706(g)" indicates "that 'rightful place' was the intended objective of Title VII and the relief accorded thereunder." Accord, *Teamsters* v. *United States, supra; Albemarle Paper Co.* v. *Moody, supra.* The persons who benefitted from the district court's reconstructed seniority system were not victims of discrimination, and the grant of constructive seniority to them distorts the statute's purposes by conferring employment benefits on the basis of race.

C. The Courts Below Should Have Avoided Creating A Substantial Constitutional Question By Refraining From Issuing A Race Conscious Seniority Order That Was Not Clearly Intended By Congress In Title VII

By upholding the district court's order under Title VII for the sole purpose of preventing any reduction in the percentage of minority employees in the Fire Department, especially in the higher ranks, the court of appeals' holding raises the issue of the constitutionality of a race conscious order under the equal protection component of the Due Process Clause of the Fifth Amendment (Pet. App. A22).[30] Obviously, such an order classifies on the basis of race (indeed, disadvantages some persons because of their race) and thereby implicates a serious equal pro-

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imbalance in their workforces. *Ibid.* Thus, notwithstanding the statements of Senators Javits and Williams, who spoke against the Ervin amendment (see 1972 *Legislative History, supra* note 16, at 1046-1048, 1071-1073), the Ervin amendments did not seek to alter Section 706(g), and did not directly concern the remedial authority of courts.

[30] Equal protection analysis under the Due Process Clause of the Fifth Amendment is the same as that under the Fourteenth Amendment. *E.g., Buckley* v. *Valeo*, 424 U.S. 1, 93 (1976). It is well established that judicial action is no less subject to the constraints of the Constitution's equal protection guaranties than is legislative action. See *Ex parte Virginia*, 100 U.S. 339 (1879).

tection concern not previously addressed by this Court. Unlike the practices upheld in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), and *Regents* v. *Bakke*, 438 U.S. 265 (1978), individuals in this case have been deprived of previously vested rights; and unlike the situation in *Franks* v. *Bowman Transportation Co.*, *supra*, those rights were subordinated in favor of competing claims based solely on race and not because of previous injury.

Whether Congress could provide under Section 5 of the Fourteenth Amendment that race conscious modifications of a seniority system to remedy past discrimination are permissible in order to maintain an integrated work place and, if so, what types of modifications it could approve are issues that have never been decided by this Court. Cf. *Fullilove* v. *Klutznick*, *supra*, 448 U.S. at 483. But they are questions that should be addressed only when it is reasonably clear that Congress intended to authorize such relief and thereby force the Court to evaluate Congress's power to act through the courts on a race conscious basis.[31] This is particularly so in a Title VII case, where the district court's equitable authority is carefully delimited by Congress's intent and the purposes of the Act. See *Ford Motor Co.* v. *EEOC*, *supra*, slip op. 8; *Teamsters* v. *United States*, *supra*, 431 U.S. at 364; *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 416-417. Thus, if the Act does not support the order of the court, there is no residual equitable discretion.

Regardless of what can be gleaned from the legislative history of Title VII with regard to its general policies, there is not a shred of evidence that Congress either in 1964 or 1972 intended to authorize a district court to modify a last-hired, first-fired rule in order to maintain

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[31] Another possibility, not presented here, would be a requirement that other race-neutral indicia of merit, in addition to seniority, be utilized in determining which employees to lay off, in the hope of preserving more of the results of the consent decree. It might well be within the constitutional power of Congress to impose such a requirement, but, for reasons previously stated, judicial modification of the seniority system in that way would be inconsistent with the remedial policies of Title VII.

racial balance.[32] Moreover, no court had ever considered the issue prior to 1972. In the absence of clear evidence of at least arguable congressional intent to allow a district court to take into account such societal concerns as a basis for disadvantaging one racial group as against another with regard to seniority rights, the courts below should have interpreted Title VII as prohibiting the order adopted in this case and thereby avoided creating a difficult constitutional issue. See *United States* v. *Security Industrial Bank*, No. 81-184 (Nov. 30, 1982), slip op. 8; *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 507 (1979).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

CHARLES JUSTIN COOPER
Deputy Assistant Attorney General

CARTER G. PHILLIPS
Assistant to the Solicitor General

BRIAN K. LANDSBERG
DENNIS J. DIMSEY
Attorneys

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[32] The court of appeals opined that racial balance in public safety departments is in the public interest (Pet. App. A31). If such concerns had led state or local authorities to adopt a race conscious hiring or layoff plan because of operational needs in enhancing the community's fire protection, a substantial constitutional question would be presented. See *Minnick* v. *California Department of Corrections*, 452 U.S. 105 (1981); cf. *Morton* v. *Mancari*, 417 U.S. 535 (1974). But the City-adopted seniority system precluded the assertion here by the City of any such operational needs, and it was improper in these circumstances for the courts below to hypothesize such operational needs and thereby impinge upon constitutionally protected interests of individuals.

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